Supreme Court, U.S.
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No. 03-5554

In The
Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA AND THE COUNTY OF HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan, nonprofit organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and in this Nation's civil rights laws. The ACLU of Nevada is one of the ACLU's statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in numerous cases involving the proper scope and meaning of the Fourth Amendment to the United States Constitution. Because this case raises important Fourth Amendment questions, its resolution is a matter of significant concern to the ACLU and its members.[1]

STATEMENT OF THE CASE

On May 21, 2000, Humboldt County, Nevada Sheriff's Department Deputy Lee Dove responded to a report that an individual had been observed striking a female passenger in a truck. Upon his arrival at the scene, Deputy Dove saw Petitioner Larry Hiibel, who appeared to be intoxicated, standing next to a parked truck occupied by a minor. Deputy Dove approached, and asked Petitioner to identify himself. Petitioner refused "because he did not

[1] Letters of consent to the filing of this brief have been lodged with the Court, pursuant to Rule 37.3; pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel has made a monetary contribution to its preparation or submission.

believe he had done anything wrong." *Hiibel v. Sixth Judicial Dist. Ct.*, 59 P.3d 1201, 1203 (Nev. 2002).

After eleven unheeded requests for identification, Deputy Dove placed Petitioner under arrest. He explained his actions as follows:

> [D]uring my conversation with Mr. Hiibel, there was a point where he became somewhat aggressive. I felt based on me not being able to find out who he was, to identify him, I didn't know if he was wanted or what [h]is situation was, I [w]asn't able to determine what was going on crimewise in the vehicle, based on that I felt he was intoxicated, and how he was becoming aggressive and moody, I went ahead and put him in handcuffs so I could secure him for my safety, and put him in my patrol vehicle.

Id. Thereafter, Petitioner was charged with, and convicted of, resisting a public officer, in violation of Nevada Revised Statutes § 199.280, based upon his refusal to identify himself when requested to do so by Deputy Dove, as required by Nevada Revised Statutes § 171.123(3).[2]

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[2] Section 171.123 of the Nevada Revised Statutes provides, in pertinent part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> * * *
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so

(Continued on following page)

On appeal, Petitioner challenged the constitutionality of Nevada Revised Statutes § 171.123(3) on the grounds that an individual detained by a police officer based only upon the officer's reasonable suspicion of criminal activity, as permitted by *Terry v. Ohio*, 392 U.S. 1 (1968), cannot be compelled under penalty of law to identify himself during the course of that temporary detention, in violation of rights secured by the Fourth and Fifth Amendments to the United States Constitution. The Nevada Supreme Court upheld Petitioner's conviction, holding that the statute's command satisfied the Fourth Amendment because the "public interest in requiring individuals to identify themselves to officers when a reasonable suspicion exists is overwhelming." *Hiibel*, 59 P.3d at 1205. According to the majority, providing one's name "is far less intrusive than conducting a pat-down search of one's physical person," permitted by *Terry*. *Id.* at 1206. In particular, the court held the statute's self-identification requirement constitutional under the Fourth Amendment because "[a]n ordinary person would conclude that it was [Petitioner] who was unreasonable, not the law." *Id.* at 1207.

Three justices of the Nevada Supreme Court dissented, finding the court's holding to be an exaggerated and unwarranted reaction "to the public's fear during this time of war 'against an enemy who operates with a concealed identity.'" *Id.* at 1209. They concluded that the

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> detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.
>
> 4. A person may not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes.

statute violated the Fourth Amendment because this Court "has consistently recognized that a person detained pursuant to *Terry* 'is not obliged to answer' questions posed by law enforcement officers," and because the individual's "security outweighed any potential link leading to arrest that could be gleaned from his identity." *Id.* at 1208. This Court granted certiorari to determine whether the State may compel people to identify themselves (during a police investigation) when they are being seized upon less than probable cause.

SUMMARY OF ARGUMENT

Justice Brandeis famously observed that the Fourth Amendment to the United States Constitution embodies an individual's "right to be let alone," an entitlement constituting the "most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting). This Court has long held that the Fourth Amendment protects this "inestimable right of personal security," *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), by prohibiting the search and seizure by the police of an individual's person in the absence of probable cause. *Florida v. Royer*, 460 U.S. 491, 498 (1983). In *Terry v. Ohio*, 392 U.S. at 27-30, the Court recognized "a limited exception to this general rule," allowing a law enforcement officer to briefly detain a person on the street based upon a reasonable suspicion of criminal activity, and to frisk the person for concealed weapons. *See also United States v. Sokolow*, 490 U.S. 1, 17 (1989).

Because *Terry* represented a departure from the constitutional mandate of probable cause, this Court has maintained it as a narrowly defined exception defined solely by its underlying purpose. *See Dunaway v. New York*, 442 U.S. 200, 207-09 (1979). Thus, while *Terry* allows a police officer to "ask the detainee a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer's suspicions," this Court has also held that the individual detained "is not obliged to respond" to such questions, and must be released unless his "answers provide the officer with probable cause to arrest him." *Berkemer v. McCarty*, 468 U.S. 420 (1984).

Here, Nevada Revised Statutes § 171.123(3), which compels an individual stopped by the police to identify himself, under penalty of law, circumvents the Fourth Amendment's probable cause requirement by authorizing an arrest based solely upon the individual's exercise of his right *not* to answer questions posed to him by the police under such circumstances, and thereby manufactures probable cause in a *Terry* context in which it is, by definition, otherwise absent. *See* Point I, *infra*. Moreover, although the Nevada Supreme Court concluded that compelled self-identification is a "reasonable" intrusion upon an individual's Fourth Amendment rights to privacy and security because it advances the general objectives of crime prevention and detection, the court's decision fails to substantiate any *specific* law enforcement interest that might justify such a serious abridgement of those rights, as required by *Terry* and its progeny. *See* Point II, *infra*.

As discussed below, the State of Nevada may not override the probable cause requirement of the Fourth Amendment by legislating a system in which silence is

sufficient to transform reasonable suspicion into the probable cause necessary to arrest. Yet, that is both the purpose and effect of Nevada Revised Statutes § 171.123(3), which criminalizes constitutionally protected behavior, and authorizes arrests based on conduct that would not otherwise amount to probable cause. Accordingly, this Court should hold that Section 171.123(3) violates the Fourth Amendment to the United States Constitution.

ARGUMENT

I. NEV. REV. STAT. § 171.123(3) IS UNCONSTITUTIONAL BECAUSE THE FOURTH AMENDMENT PROTECTS AN INDIVIDUAL SUBJECT TO A *TERRY* STOP FROM BEING COMPELLED TO RESPOND TO QUESTIONS POSED BY THE POLICE.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " This "right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry*, 392 U.S. 1, 8-9 (1968). Generally, this right may not be intruded upon by the government absent probable cause, *see Dunaway v. New York*, 442 U.S. 200, 208 (1979); indeed, it is the probable cause requirement that "safeguard[s] citizens from rash and unreasonable interferences with [their] privacy." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Nevertheless, in *Terry v. Ohio*, *supra*, this Court held that, even in the absence of probable cause, a law enforcement officer may briefly

detain a person on the street, based upon a reasonable suspicion of criminal activity, for the limited purpose of investigating the circumstances that provoked suspicion in the first instance. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) ("[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'"). Moreover, in connection with such a temporary investigative detention, the police officer may frisk the person to protect himself from the immediate threat posed by concealed weapons, where the officer "has reason to believe that he is dealing with an armed and dangerous individual." *Terry*, 392 U.S. at 27. *See Ybarra v. Illinois*, 444 U.S. 85, 93 (1979); *Adams v. Williams*, 407 U.S. 143 (1972).

Because *Terry* represented an exception to "long prevailing standards" of probable cause, *Brinegar*, 338 U.S. at 176, this Court has maintained the "stop and frisk" exception to the Fourth Amendment's probable cause requirement, carved out in *Terry*, as an exceedingly narrow one. *United States v. Place*, 462 U.S. 696 (1983); *Dunaway*, 442 U.S. at 210. In particular,

1) the "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," *Florida v. Royer*, 460 U.S. 491, 500 (1983) (citations omitted);

2) the investigative methods utilized must be "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time," *id.*, and;

3) most significantly for purposes of this case, the police officer may question the individual detained, but the individual "need not answer

> any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id.* at 497-98.

Failure to observe these limits converts a *Terry* encounter into a full-fledged arrest under the Fourth Amendment that can only be justified by probable cause. *Royer*, 460 U.S. at 1325; *Dunaway*, 442 U.S. at 216; *Brignoni-Ponce*, 422 U.S. at 881-82.

In enacting and enforcing Section 171.123(3), the State of Nevada has circumvented the Fourth Amendment's probable cause requirement by authorizing its law enforcement officers to arrest an individual seized on the basis of reasonable suspicion, and with respect to whom probable cause is lacking, based solely upon the individual's exercise of his constitutionally protected right to remain silent under such circumstances. By criminalizing the mere refusal to identify oneself, the State impermissibly infringes not only the individual's Fifth Amendment privilege against self-incrimination, as addressed by other respected *amicus*, *see Brief of Amicus Curiae Electronic Frontier Foundation*,[3] but also, as discussed below, his right under the Fourth Amendment to remain "secure in his person" by refusing to answer questions posed to him

[3] *See generally Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or *informal*, where the answers might incriminate him in future criminal proceedings") (emphasis added); *Haynes v. United States*, 390 U.S. 85, 97 (1968) (disclosure of identity in a criminal area of inquiry involves "real and appreciable" hazards of self-incrimination).

by the police until such time as the police have probable cause to effect his arrest. Moreover, where probable cause is otherwise absent, the Fourth Amendment precludes the State from legislating a regime in which silence alone is sufficient to transform mere reasonable suspicion into the probable cause necessary to arrest an individual. Because that is both the purpose and effect of Section 171.123(3), the statute is unconstitutional, and the judgment of the Supreme Court of Nevada must be reversed.

Of course, a police officer executing a *Terry* stop may attempt to expand upon the reasonable suspicion that gave rise to the stop in the first instance by asking questions of the individual detained. However, "[i]f the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). *See Brinegar*, 338 U.S. at 177 ("The citizen who has given no good cause for believing he is engaged in [criminal] activity is entitled to proceed on his way without interference"). In this regard, an individual subjected to a *Terry* stop cannot be compelled under penalty of law to answer questions and, thereby, run the risk of himself providing the probable cause necessary for the officer to effect a full-blown arrest. Rather, this Court has repeatedly recognized that an individual has an absolute right under the Fourth Amendment *not* to respond to questions posed to him by a law enforcement officer during a seizure predicated on less than probable cause.

Although the majority in *Terry* did not address this issue directly, Justice Harlan explained in his concurring opinion that while a police officer (like every other citizen) is free to pose questions to persons standing on the street, "the person addressed has an equal right to ignore his

interrogator and walk away." 392 U.S. at 32-33 (Harlan, J., concurring). Similarly, Justice White explained in his separate concurring opinion that, during a *Terry* stop, "the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest." *Id.* at 34.

Since *Terry* was decided, the Court has both implicitly and explicitly reinforced this "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi*, 394 U.S. 721, 727 (1969). In *Adams v. Williams*, 407 U.S. 143 (1972), cited by Respondents in support of the proposition that compelled self-identification is part and parcel of the *Terry* exception, *see, e.g.,* Opp'n Cert. at 10, the Court noted the admitted rule that an officer may inquire regarding an individual's identity as part of his investigation during a *Terry* stop. *Id.* at 146 (citations omitted). But *Adams* does not hold, as Respondents suggest, that simply because an officer may inquire, the individual is therefore required to respond. To the contrary, the Court in *Adams* went no further than to delineate the permitted scope of a *police officer's* inquiry; it did not purport to address the obligation of the *individual detained* to cooperate with the investigation, much less compel that individual to respond to the questions posed to him.

In *Florida v. Royer*, this Court held that when an officer approaches an individual without reasonable suspicion or probable cause, the individual has a right to ignore the police and go about his business, and made clear that such individual has a fundamental right to

decline to respond to any questions posed to him by the police:

> The person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

460 U.S. at 497-98 (citations omitted). *See also Brown v. Texas,* 443 U.S. 47, 52 (1979) (holding that the conduct of the arresting officer was unconstitutional because "the only reason he stopped appellant was to ascertain his identity," which did not constitute the reasonable suspicion required by *Terry*); *Kolender v. Lawson*, 461 U.S. 352, 369 (1983) (explaining that "probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry*, including either arrest or the need to answer questions that the individual does not want to answer") (Brennan, J., concurring).

In *Berkemer v. McCarty*, 468 U.S. 420 (1984), a unanimous Court – relying upon Justice White's concurring opinion in *Terry* – expanded this principle to the *Terry* context, holding that an individual stopped pursuant to *Terry* is not "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), precisely *because* the individual remains free to ignore or otherwise decline to respond to an officer's questions. As the Court explained:

> [In a *Terry* stop] the officer may ask the detainee a moderate number of questions to determine his identity and try to obtain information confirming

> or dispelling the officer's suspicions. *But the detainee is not obliged to respond.* And, unless the detainee's answers provide the officer with probable cause to arrest him, he must be released.

Berkemer, 468 U.S. at 439-40 (emphasis added) (citing *Terry*, 392 U.S. at 34 (White, J., concurring)). Thus, the entirety of this Court's jurisprudence has emphasized the limited scope of an encounter between a law enforcement officer and a citizen which is premised upon less than probable cause. Specifically, these cases have repeatedly recognized that a fundamental facet of such encounters, including the limited seizures authorized by *Terry*, is the individual's Fourth Amendment right to refuse to respond to any question posed to him.

Moreover, a necessary corollary of this right, also implicit in this Court's jurisprudence, is that the refusal to answer questions posed by the police cannot, without more, transform reasonable suspicion into probable cause. This Court has repeatedly held that an individual "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Royer*, 460 U.S. at 498 (citing *United States v. Mendenhall*, 446 U.S. 544, 556 (1980)). *See also Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure"). Just as the refusal to answer questions cannot give rise to the "reasonable suspicion" necessary for a police officer to effect a *Terry* stop in the first instance, *Brown,* 443 U.S. at 53, so too where an individual has been stopped based upon a mere suspicion of criminal activity, his "refusal to answer furnishes no basis for arrest, although it

may alert the officer to the need for continued observation." *Terry*, 392 U.S. at 34 (White, J., concurring). Thus, if a person refuses to answer questions during a *Terry* stop, the police are left with only "a particularized and objective basis for suspecting [him] . . . of criminal activity," *United States v. Cortez*, 449 U.S. 411, 417-18 (1981), but no basis for further detention, let alone the probable cause required to effect his arrest. For example, in *Illinois v. Wardlow*, this Court held that unprovoked flight from a police officer, in combination with other factors (such as location), may give rise to reasonable suspicion justifying a *Terry* stop. 528 U.S. at 124-25. In explaining this decision, the Court specifically noted that "[a]llowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business *or to stay put and remain silent* in the face of police questioning." *Id.* (emphasis added).

The Fourth Amendment expresses the recognition that the power to arrest is among the greatest intrusions on individual liberty; the social, legal and human consequences of this power have thus led the Court to refrain from unduly expanding the right of law enforcement officers to demand compliance from individuals briefly detained pursuant to the limited investigatory stops condoned in *Terry*. The statute in question, Nev. Rev. Stat. § 171.123, seeks to upset this balance by legislating an exception to the individual's established right to refuse to identify himself in such an encounter, thereby purporting to manufacture probable cause where it does not otherwise exist. Indeed, the statute creates a state-sanctioned backdoor for arrest if an officer has no more than a reasonable suspicion that a crime may have occurred: where

an individual fails to allay the officer's suspicions by refusing to identify himself, the police may then expand the scope of the confrontation, and the attendant Fourth Amendment intrusion, by arresting the individual for violating the self-identification statute, and conducting a far more extensive search incident to that arrest. *See Michigan v. DeFillippo*, 443 U.S. 31, 40 (1979) (Blackmun, J., concurring); *see also United States v. Robinson*, 414 U.S. 218, 227-28 (1973) (while a *Terry* frisk is "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby," a search incident to arrest is "justified on other grounds, and can therefore involve a relatively extensive exploration of the person"). However, a statute which serves as "merely the cloak" for arrests which would not otherwise be lawful is a pernicious affront to the Fourth Amendment and cannot be upheld. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) ("a direction by a legislature to the police to arrest all 'suspicious persons' would not pass constitutional muster"). Thus, contrary to the Supreme Court of Nevada's declaration that Fourth Amendment rights "hold their own when a certain point is reached," *Hiibel*, 59 P.3d at 1206, a statute that compels self-identification, and thereby disregards the constitutionally significant distinction between reasonable suspicion and probable cause, represents an unjustified expansion of *Terry* and must be invalidated.

In short, the State of Nevada may not criminalize by statute conduct that is constitutionally protected. *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (holding that the State may not make "a crime out of what under the Constitution cannot be a crime"). *See also Kolender,* 461 U.S. at 366-67 (Brennan, J., concurring) (noting that the States

"cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a *Terry* encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody"). Yet, Nevada Revised Statutes § 171.123(3) seeks to do just that by requiring a person to respond to questions regarding his identity at a time when he has the right to refuse to do so. Accordingly, Section 171.123(3) runs afoul of the Fourth Amendment, and should be declared unconstitutional.

II. COMPELLING AN INDIVIDUAL SUBJECT TO A *TERRY* STOP TO IDENTIFY HIMSELF IS NOT A REASONABLE INVASION OF THE INDIVIDUAL'S FOURTH AMENDMENT RIGHT TO BE SECURE IN HIS PERSON.

The Nevada Supreme Court upheld the constitutionality of Nevada Revised Statutes § 171.123(3) on the grounds that compelling an individual subject to a *Terry* stop to identify himself was a "reasonable" intrusion upon the individual's Fourth Amendment rights because it advanced a legitimate law enforcement objective, and was much less of an invasion than the frisk for weapons permitted by this Court in *Terry*. As discussed below, the mere fact that an additional intrusion upon an individual's constitutionally protected privacy and security interests might advance the objectives of law enforcement is never enough to ignore or override those constitutional rights. Moreover, compelling an individual to answer questions posed to him is a significant intrusion upon that person's privacy, which is not at all akin to a frisk for weapons, and which cannot be justified on that basis.

This Court has recognized that a *Terry* stop represents a significant infringement of an individual's personal security:

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

Terry, 392 U.S. at 16-17. Nevertheless, the Court in *Terry* balanced the intrusion upon the individual's Fourth Amendment right to privacy and security against "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967), and ultimately permitted a brief stop based upon reasonable suspicion because of its temporary nature and limited scope. *Terry*, 392 U.S. at 20. As the Court explained, however, the "crux" of the *Terry* case was not the "propriety" of the police officer taking steps to investigate the suspicious behavior he had witnessed by stopping Terry but, rather, "whether there was justification for [the officer's] invasion of Terry's personal security by searching him for weapons in the course of that investigation." *Id.* at 23. Ultimately, the Court concluded that the

frisk attendant to the stop was permissible because of "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* Thus, the frisk was deemed to be a reasonable intrusion of the individual's security because it was necessary to, and *actually would*, protect the police officer from the *immediate* threat posed by a potential concealed weapon. *Id.* at 25-26.

Even a search for weapons of the sort approved in *Terry* "must, like any other search, be strictly circumscribed by the exigencies which justify its initiation." *Id.* at 26. For example, where an item is discovered in plain view during a search authorized by a warrant, this Court has prohibited law enforcement officers from so much as slightly moving the item to confirm that it is contraband because "taking action, unrelated to the objectives of the authorized intrusion . . . produce[s] a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the [initial search]." *Arizona v. Hicks*, 480 U.S. 325-26 (1987) (holding that plain view exception did not permit police officer to move item discovered in plain view even slightly in order to reveal serial numbers because such action constituted an unauthorized invasion of the individual's privacy unjustified by the interest justifying the initial intrusion). *See also Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (holding that frisk violated Fourth Amendment where "incriminating character of the object was not immediately apparent" to the officer, who "determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement").

Similarly under *Terry*, even though the intrusion upon an individual's privacy and security occasioned by a search for weapons is reasonable under the Fourth Amendment, this Court has never expanded *Terry* to allow more wide-ranging searches of an individual stopped on the street in the absence of probable cause. This is so even where the additional intrusion might further the State's general interest in crime prevention and detection. *See United States v. Sharpe*, 470 U.S. 675, 691 (1985) (Marshall, J., concurring) ("Regardless how efficient it may be for law enforcement officials to engage in prolonged questioning to investigate a crime, or how reasonable in light of law enforcement objectives it may be to detain a suspect until various inquiries can be made and answered, a seizure that in duration, scope, or means goes beyond the bounds of *Terry* cannot be reconciled with the Fourth Amendment in the absence of probable cause."). Rather, the Court has insisted that the interest justifying the additional intrusion be sufficiently specific to outweigh the individual right to be forfeited. *See Kolender,* 461 U.S. at 367 (noting that interest justifying expansion of *Terry*'s explicitly limited exception to probable cause requirement must be more particular than the "general facilitation of police investigation and preservation of public order").

By compelling an individual subject to a *Terry* stop to identify himself, and by threatening the arrest of those who refuse, Section 171.123(3) authorizes significantly more than a "minimal" intrusion upon an individual's well-established interests in personal privacy and security. Rather, it obliterates the right to remain silent and to not respond in the face of police inquiry, a right protected by both the Fourth Amendment, *see supra*, Point I, and the Fifth Amendment, *see Brief of Amicus Curiae Electronic*

Frontier Foundation. The critical issue is not – as the Nevada Supreme Court perceived, 59 P.3d at 1206 – whether compelling an individual to identify himself is more or less intrusive than a frisk for weapons but, rather, whether this additional intrusion upon the individual's security, compelled by the statute, is reasonably justified by the interests that supported the initial intrusion. Simply stated, it is not.

First, the stop aspect of a *Terry* encounter is tolerated because a police officer (like every other citizen) is free to address questions to persons standing on the street, and the *posing* of such questions constitutes a relatively minor intrusion upon the individual's personal security. Such a stop is "reasonable," in a constitutional sense, because of the existence of a reasonable suspicion of criminal activity, combined with the fact that citizens are routinely confronted by others on the street as a matter of course. It is obvious on its face that these same interests are inapplicable to a citizen's response when so confronted: the entreaties of vendors, credit card salesmen, beggars, proselytizers, people in need of change for parking meters, and even police officers are often ignored on the street. The fact that one's identity is shared under agreeable circumstances, *cf. Hiibel*, 59 P.3d at 1206 (noting that "it is merely polite manners to introduce ourselves when meeting a new acquaintance"), does not mean that the State may compel it in circumstances a citizen may find less favorable.

Moreover, it does not legally or logically follow from the fact that the "reasonableness" of a police officer's conduct is, as it must be, considered in determining whether the officer's stop and frisk was allowable under the Fourth Amendment, that the "reasonableness" of the

subject individual's conduct (i.e., his decision not to identify himself) must also be considered in determining whether it is constitutionally permissible for the police to compel the individual to answer. *Cf. Hiibel*, 59 P.3d at 1206 ("Reasonable people do not expect their identities – their names – to be withheld from officers."). As discussed above, an individual has a constitutional right *not* to respond to police inquiries, regardless of whether it would actually be *more* reasonable for him to answer the questions and be on his way. *See, e.g., Berkemer v. McCarty,* 468 U.S. at 439. That is, "reasonableness" serves as a limitation upon state action, not upon the conduct of its citizens. *See Terry*, 392 U.S. at 19-20 ("[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one – whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.").

Second, the scope of a *Terry* stop may be expanded under certain circumstances to allow a police officer to frisk the individual detained. This expansion is permitted based upon the substantial threat that may be posed by a concealed weapon, a threat quickly neutralized by the frisk permitted under *Terry*. *See Sibron v. New York*, 392 U.S. 40, 65 (1968) (holding that the *Terry* exception was created for "the protection of the officer by disarming a potentially dangerous man"). And, of course, even beyond a weapons frisk, the police have an array of investigatory tools at their disposal during a *Terry* stop, including:

> The threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Mendanhall, 446 U.S. at 554. *See Graham v. Conner*, 490 U.S. 386 (1989); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (order to get out of car is permissible in *Terry* stop as *de minimis* intrusion). All such tactics, however, are specifically designed to address the *immediate* threat to the police officer's safety at the outset of a *Terry* confrontation.

The same is not true of compelled disclosure of a person's identity. It is exceedingly unlikely that the immediate disclosure of an individual's identity will substantially, or even minimally, forestall any threat to the officer executing the search. Certainly the Nevada Supreme Court was not presented with any evidence of such effect. *See Hiibel*, 59 P.3d at 1209 (Agosti, J., dissenting) (noting that the majority "does not provide any evidence that an officer, by knowing a person's identity, is better protected from potential violence"). Nor can the mere invocation by the court of the amorphous threat posed by sex offenders, terrorists, and the like, 59 P.3d at 1206, combined with its unsubstantiated assertion that compelled self-identification will somehow combat those evils, warrant the abridgement of a citizen's Fourth Amendment rights to privacy and security.

The balancing of interests set forth in *Terry* preserves the most critical Fourth Amendment protections, those which are threatened when the police act on less than the constitutionally required finding of probable cause. The Nevada Supreme Court's oversimplification of an individual's Fourth Amendment rights to privacy and security – both during and outside of a *Terry* detention – grossly

minimizes the "severe" and "frightening" intrusion inherently present when one is detained even briefly by a police officer. *Terry,* 392 U.S. at 24-25. Moreover, the requirement that an individual identify himself, or risk incarceration, goes well beyond the limited intrusion contemplated by *Terry* and its progeny, which was reasonably related to specific and articulable interests above and beyond the State's general interest in crime prevention and detection. For these reasons, the alleged benefits of a requirement that a person subject to a *Terry* stop identify himself to the detaining police officer, as required by Nevada Revised Statutes § 171.123(3), is substantially outweighed by the individual's countervailing interest in privacy and security, as protected by the Fourth Amendment. Accordingly, the statute should be held unconstitutional.

CONCLUSION

For the reasons set forth above, the Court should hold Nevada Revised Statute § 171.123(3) unconstitutional under the Fourth Amendment, and reverse the judgment of the Supreme Court of Nevada.

Respectfully submitted,

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